In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1391

ARTURO JAIME LERMA SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court abused its discretion in refusing to transfer his case and in denying his motion for a bill of particulars.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner and co-defendant Salinas were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to fifteen years' imprisonment with three years' special parole. The court of appeals affirmed (Pet. App.; 508 F.2d 388).

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[1]The indictment charged petitioner, co-defendant Salinas and eleven other co-defendants with conspiracy (count 1); substantive counts (2, 3, 4 and 6) charged the other co-defendants with related drug offenses in violation of 21 U.S.C. 841(a) (1). Count 5 charged a co-defendant with a firearm violation. Ten of the co-defendants pleaded guilty to one or more counts of the indictment. One co-defendant, Martinez, was in jail in Mexico and unavailable for trial. Thus, only petitioner and co-defendant Salinas went to trial.

The evidence showed that from November 1972, through February 1973, petitioner was involved in a large-scale conspiracy to distribute cocaine in the Arlington-Fort Worth-Dallas, Texas area and in Overland Park, Kansas. Evidence concerning petitioner's involvement was adduced primarily through the testimony of indicted co-defendants Laurel (Tr. 83-220), Guevara (Tr. 276-320, 539-541) and Walker (Tr. 223-272), together with that of undercover agents.

1. Petitioner contends that the district court abused its discretion in denying his motion, pursuant to Fed. R. Crim. P. 21(b), to transfer the case to the Southern District of Texas, where he resided, since all transactions involving him allegedly occurred in that district and it was inconvenient for prospective defense witnesses to travel to the Northern District.[2] The district court, however, properly took account of a number of factors that are pertinent in determining whether to transfer, including the location of the defendants, possible witnesses, events likely to be in issue, documents or records likely to be involved, counsel, and the relative accessibility of the place of trial. *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 243-244.

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[2]In conspiracy prosecutions, venue may lie either in the district in which the agreement was made or where an overt act in furtherance of the conspiracy was committed. See, *e.g.*, *Hyde* v. *United States*, 225 U.S. 347; *United States* v. *Overshon*, 494 F.2d 894, 900 (C.A. 8), certiorari denied, 419 U.S. 853, 878; *United States* v. *Barnard*, 490 F.2d 907, 910 (C.A. 9), certiorari denied, 416 U.S. 959.

Here, the conspiracy allegedly involved a wide territory from the Texas-Mexican border to Kansas City, Kansas (Pet. App. A-16). The government stated that its evidence indicated that petitioner was a major supplier whose jobbers sold cocaine obtained from him to wholesalers in an area within the Northern District of Texas (see *ibid.*). While part of the illegal agreement may have been formed within the Southern District, several of the co-defendants joined the conspiracy within the Northern District, and many of the overt acts alleged in the indictment occurred there (*ibid.*). Several of the co-defendants were arrested within the Northern District, and most of them resided there (Pet. App. A-14).

The district court acted within its discretion in declining to transfer the case to the Southern District. See *United States* v. *Projansky*, 465 F.2d 123, 139 (C.A. 2), certiorari denied, 409 U.S. 1006; *United States* v. *Phillips*, 433 F.2d 1364, 1368 (C.A. 8), certiorari denied, 401 U.S. 917.

2. Petitioner also contends that the district court abused its discretion in denying his motion for a bill of particulars. Prior to trial petitioner moved for a bill of particulars seeking, *inter alia*, the names of witnesses and informants and discovery and inspection of tangible evidence (Pet. App. A-20).[3] The district court denied the motion in substantial part.

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[3]The indictment had charged petitioner and twelve others with conspiracy to distribute cocaine. It outlined the object of the conspiracy and listed ten overt acts committed in the furtherance of the conspiracy, in none of which petitioner was alleged to have participated.

Petitioner, however, received all the pretrial discovery to which he was entitled. On the day preceding the trial, the government informed petitioner's counsel that indicted co-defendant Laurel would testify for the government and furnished a copy of the statement Laurel had made to the prosecutors. As the court of appeals noted, there is nothing in the record which shows that the government was previously aware that Laurel would testify for the government (Pet. App. A-21). In any event, under the Jencks Act, petitioner would not have been entitled to a copy of Laurel's statement until the conclusion of his direct testimony. 18 U.S.C. 3500.

In the morning preceding the trial, the district court ordered the government to inform petitioner of the particular acts he was alleged to have committed in furtherance of the conspiracy. Prior to trial, the government also furnished petitioner's counsel with a copy of the government file on the case, including all the official reports of government narcotics agents and statements of persons who did not testify (Pet. App. A-24 to A-25). The only part of the file that was not given to petitioner's counsel dealt with unrelated conspiracies involving other persons (*ibid.*).[4]

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[4]A bill of particulars cannot be used to obtain a list of government witnesses. See *United States* v. *Johnson*, 504 F.2d 622, 627-628 (C.A. 7); *United States* v. *Cansler*, 419 F.2d 952, 954 (C.A. 7), certiorari denied, 397 U.S. 1029.

In any event, petitioner has not shown how he was prejudiced by the district court's denial of his motion for a bill of particulars. Indeed, during the hearing on his motion for a new trial, petitioner's counsel indicated that his only complaint about discovery was the lateness in receiving co-defendant Laurel's statement (Pet. App. A-23). But as we have indicated, petitioner was not entitled to have received Laurel's statement earlier.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.